15 - 1823

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DONAHUE FRANCIS,
Plaintiff-Appellant,

v.

KINGS PARK MANOR, INC., and CORRINE DOWNING,
Defendants-Appellees,

and

RAYMOND ENDRES,
Defendant.

On Appeal from the United States District Court
for the Eastern District of New York
The Honorable Arthur D. Spatt, District Judge, Presiding

MOTION FOR LEAVE TO FILE BRIEF BY GEORGETOWN UNIVERSITY LAW CENTER CIVIL RIGHTS CLINIC AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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May 7, 2020

The Georgetown University Law Center Civil Rights Clinic respectfully requests leave to file the attached brief as amicus curiae in support of Plaintiff-Appellant Donahue Francis. Fed. R. App. P. 29(a)(3).

The Clinic operates as a public interest law firm and clinical education program, in which experienced litigators supervise student attorneys. The Clinic represents individual clients and public interest organizations in various types of civil rights cases, including housing discrimination. It has a professional and educational interest in this case because it frequently litigates—and has developed expertise in—fair housing law.

This case addresses important legal questions within the Clinic's expertise. The Clinic's brief seeks to aid the Court's consideration of this case by describing a recent relevant rulemaking by the U.S. Department of Housing and Urban Development. It argues that HUD's Rule is a reasoned policy judgment entitled to *Chevron* deference under this Court's precedent. Additionally, the brief addresses why the HUD Rule results in the most effective legal standard for implementing the Fair Housing Act. These topics are not addressed by the parties or other amici in this case. The Clinic is uniquely situated to discuss these issues. It has been deeply involved in notice-and-comment rulemaking in the fair housing context and represents clients who are impacted by fair housing enforcement. The outcome of this case is likely to have significant implications for the development of federal

law in this and other circuits and the lives of the Clinic's clients. Additionally, submitting a brief to this Court is a valuable educational opportunity for the student attorneys. Accordingly, the Clinic respectfully requests leave to file the attached brief.

Respectfully Submitted,

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CORPORATE DISCLOSURE STATEMENT

Georgetown University and its affiliate schools, including the Georgetown University Law Center and its clinics, are organized and operated as a nonprofit corporation under Section 501(c)(3) of the Internal Revenue Code. They do not have any parent or subsidiary corporations, are not owned in whole or in part by any publicly held corporation, and do not issue stock.

INTEREST OF AMICUS CURIAE

The Georgetown University Law Center Civil Rights Clinic operates as a public interest law firm and clinical education program, in which experienced litigators supervise student attorneys. The Clinic represents individual clients and public interest organizations, primarily in the areas of civil rights discrimination, constitutional rights, and government transparency. It has a professional and educational interest in this case because it frequently litigates—and has developed expertise in—fair housing law.

The Clinic's supervising attorneys have a combined forty years of practice experience, the majority in civil rights litigation. The Clinic's director has filed amicus briefs in some of the most significant fair housing cases of our day, including *Township of Mount Holley v. Mt. Holly Gardens Citizens in Action, Inc.*, 571 U.S. 1020 (2013) and *Texas Dept. of Hous. & Comm. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

The Clinic has been deeply involved in notice-and-comment rulemaking in the fair housing context and represents clients who are impacted by fair housing enforcement. Moreover, the outcome of this case is likely to have significant implications for the development of federal law in this and other circuits in which the Clinic practices and will affect the lives of the Clinic's clients.

This case addresses important legal questions within the Clinic's expertise. Our brief seeks to aid the Court's consideration of the case by describing a recent relevant rulemaking by the U.S. Department of Housing and Urban Development. This brief argues that HUD's Rule is a reasoned policy judgment entitled to *Chevron* deference under this Court's precedent. Additionally, the brief addresses why the HUD Rule results in the most effective legal standard for implementing the Fair Housing Act. These topics are not addressed by the parties or other amici in this case. The Clinic is uniquely situated to discuss these issues.

Finally, the Clinic's amicus brief looks beyond the immediate decision to the wider implications of this case, a perspective not offered by the parties' briefs. The Clinic represents low-income victims of housing discrimination, arguably the people most affected by tenant-on-tenant harassment. These low-income tenants do not have the luxury of easily relocating in the face of a hostile home environment. Instead of risking homelessness, tenants are likely to stay put, even if it means enduring cruel and demeaning racial harassment. A legal schema that sanctions unbridled racial harassment—despite a landlord's ability to intervene—is both unlawful and unnecessary.[1]

[1] Amicus certifies that no party's counsel authored this brief, in whole or in part, that no party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person contributed money intended to fund the preparation or submission of the brief.

INTRODUCTION

Every person, regardless of race, color, religion, sex, disability, familial status, or national origin, is entitled to a home of one's own, where, behind closed doors, one may retreat to safety and privacy with family and friends. When a landlord knows one tenant is preventing another from living in safety and security by creating a discriminatory and threatening environment, yet does nothing, the landlord should be held accountable. Realistically, landlords are best positioned to restore a hostile environment to a safe one. Landlords already intervene when one tenant harms another by holding loud parties or housing a dangerous animal. Just as a landlord is expected to fix a burst pipe or leaky roof, so too the landlord should take care to mitigate illegal harassment and discrimination. A landlord who fails in this minimal duty is liable for the harm the tenant suffers.

A recent rule promulgated by the U.S. Department of Housing and Urban Development formalizes this reasonable duty, reflecting HUD's reasoned judgment that the Title VII negligence standard is the most appropriate standard for landlord liability. HUD's decision to hold landlords liable for discrimination when they know of it—and have the power to act—reflects a commonsense understanding of both those governed by the Fair Housing Act and those charged with enforcing it. Ensuring that one tenant does not engage in illegal discrimination and harassment

against another tenant is another basic obligation of ownership. Thus, the HUD standard does not impose any additional or undue burden.

SUMMARY OF ARGUMENT

I. This Court defers to an agency's interpretation of a statute when the statute is unclear, the agency has expertise, and the agency's interpretation of the statute is reasonable. HUD's modest negligence standard holding landlords accountable for discrimination by tenants fits that bill. It is reasonable and therefore entitled to *Chevron* deference.

HUD, with its decades of experience enforcing housing laws, has reasonably determined that—in limited circumstances—landlords should be liable for failure to maintain a minimum standard of safety on their premises. Landlords have a basic responsibility for maintaining the habitability of their premises. Landlords must ensure that the doors lock and that the pipes work. But that responsibility does not end at a building's structure. Similarly, landlords have a responsibility to dispel the source of racial harassment when it is known and within the landlord's power to act. This approach is consistent with Supreme Court precedent under Title VII—the Court's customary source of guidance in interpreting the Fair Housing Act—and longstanding HUD policy. This Court routinely grants such administrative rules *Chevron* deference, and this case should be no different.

II. Even if this Court does not accord *Chevron* deference to the HUD Rule, it should not hesitate to reach the same conclusion as HUD—that a landlord is liable for negligently allowing a hostile environment. This Court routinely looks to Title VII for guidance in interpreting the FHA. Although there are differences between employment and housing, there is no meaningful reason not to apply analogous Title VII principles in this context. This brief addresses the misconceptions behind the panel's hesitation to apply Title VII standards in this case.

Moreover, Title VII principles are consistent with New York state law, which extends a landlord's direct liability beyond harmful conditions caused by the landlord alone to harmful conditions caused by other tenants, a principle that two other federal circuits have adopted.

III. Finally, effective enforcement of the FHA requires a negligence standard. HUD's flexible standard protects housing providers from unreasonable claims, and a negligence standard is more appropriate in the housing context than a deliberate indifference standard.

ARGUMENT

I. HUD'S REASONABLE HOSTILE ENVIRONMENT RULE IS ENTITLED TO *CHEVRON* DEFERENCE.

Agency rulemaking receives judicial deference when it reasonably interprets an area of Congressional silence or ambiguity in a federal statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In this case, HUD has issued a reasonable interpretation of the FHA and its reasonable judgment is squarely within the sphere of agency decisionmaking which this Court accords *Chevron* deference.

In the Fair Housing Act, Congress empowered HUD to enforce and administer the Act, including making policy determinations through rulemaking. 42 U.S.C. §§ 3535(d), 3608, 3614a. This has enabled HUD to develop specialized expertise beyond a generalist court. *E.g.*, *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 58–61 (2d Cir. 2004).

The FHA, however, is silent on the question of how to assess landlord liability for tenant-on-tenant harassment. Exercising its authority, HUD promulgated a rule reflecting its judgment that the Title VII negligence standard is the most appropriate standard for landlord liability. Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed. Reg. 63,054, 63,068 (Sept. 14, 2016) (HUD Rule). The HUD Rule reasonably construes the FHA to impose requirements

matching those under Title VII, a parallel statute. By engaging in notice-and-comment rulemaking, HUD considered potential policy reasons for not adopting this interpretation and exercised its reasoned judgment in issuing the final Rule.

For the reasons that follow, this judgment is reasonable and should be accorded *Chevron* deference.

A. HUD has concluded that landlords may be liable for failure to act in limited and appropriate circumstances.

There is no question that HUD has the statutory authority to address the ambiguity at issue in this case—the proper standard for landlord liability—through notice-and-comment rulemaking. 42 U.S.C. §§ 3535(d), 3614a. HUD did just that. The result is a flexible rule that prescribes landlord liability under a negligence standard.

Specifically, in HUD's judgment, a landlord may be liable if, *and only if,* three elements are present: (1) a tenant creates a discriminatory hostile housing environment for another tenant; (2) the landlord knows or should know about the conduct; and (3) the landlord fails to take prompt action to correct and end the harassment when it has the power to do so. *Id.* at 63,074; 24 C.F.R. § 100.7(a)(1).

But a landlord will *not* be liable in other circumstances, including when: (1) the plaintiff fails to establish the behavior amounted to "unlawful harassment," *see* 81 Fed. Reg. 63,061, 63,067; (2) the landlord did not know about

the harassment or have knowledge to reasonably discover it, *id.* at 63,066–67; or (3) the landlord lacked power to take corrective action, *id.* at 63,071. Unwelcome conduct may rise to the level of a hostile environment only when it is so "severe or pervasive as to interfere with … [t]he availability, sale, rental, or use or enjoyment of a dwelling …." 24 C.F.R. § 100.600(a)(2).

B. HUD's framework is reasonable because it follows controlling Supreme Court precedent and is functionally identical to Title VII and long-standing HUD policy.

When "Congress afford[s] HUD the authority to implement the FHA … this Court must defer to the agency's reasonable interpretation…." *MHANY Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016). Even where recent agency regulations differ from this Court's prior approach, this Court is "obliged to defer" to those reasonable, more recent regulations unless the underlying statute unambiguously demands a contrary result. *Id.*

HUD's Rule reasonably interprets the FHA: It reflects a longstanding, uncontroversial legal framework under Title VII that is consistent with precedent and HUD policy, and it is based on extensive public comments—all indicators that an agency's rule is reasonable. *E.g.*, *Estate of Landers v. Leavitt*, 545 F.3d 98, 105– (2d Cir. 2008). Therefore, this Court of obligated to afford *Chevron* deference.

1. This rulemaking reasonably interprets the FHA because it formalizes landlord liability under traditional principles that are widely accepted and used by both HUD and the courts. Moreover, it aligns with liability standards used in the similar Title VII context. Because HUD's interpretation aligns with precedent, agency policy, and Title VII, the Rule is reasonable, entitled to *Chevron* deference, and controls in this case.

HUD's rulemaking follows Supreme Court precedent by applying tort-liability standards to racial harassment actions. The Court has stated that FHA discrimination actions are essentially tort actions. *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citing *Curtis v. Loether*, 415 U.S. 189, 195–96 (1974)). When a statute creates tort causes of action, the Court assumes that Congress intended to incorporate the traditional tort liability rules associated with those actions into the statute. *Id.* HUD's Rule treats the FHA the same.

HUD's Rule is consistent with the agency's own longstanding policies regarding landlord liability, and HUD itself stated that the Rule codifies the agency's "longstanding view" that landlords may be liable for failure to respond to a hostile environment. 81 Fed. Reg. 63,070.

HUD also concluded that such liability may apply even in the absence of a landlord's discriminatory intent. Decades of HUD administrative actions against landlords corroborate this approach. In one representative case, HUD brought

charges against a landlord for "failing to take effective action to prevent racial harassment by other tenants." *HUD v. 57 Oxbow Associates*, No. HUDALJ 08-00-0005-8, 2003 WL 21967199, at *1 (Aug. 5, 2003). There, HUD noted that landlords are required to adhere to the agency's policy that, under the FHA "tenants and their guests have the right not to be discriminated against or harassed." *Id.* at *6. This observation illustrates HUD's longstanding practice of holding that it is a violation of the FHA for a landlord to knowingly ignore tenant-on-tenant harassment.

The same principle applies in other charges of discrimination brought by HUD, or by the Department of Justice in response to a HUD referral. *See, e.g.*, *United States v. Wheeling Hous. Auth.*, No. 5:11-cv-00009-FPS (N.D. W. Va. 2011) (charge of discrimination for landlord's failure to respond to tenant-on-tenant racial harassment); *HUD v. Davis*, No. HUDALJ 08-90-0165-1, 1994 WL 501718, at *1, *3 (Aug. 3, 1994) (charge of discrimination, requiring landlords to record and report tenant-on-tenant racial harassment).

2. What's more, courts have historically applied negligence standards in the parallel Title VII context. This is significant because Title VII and Title VIII are part of "a coordinated scheme," and courts customarily look to Title VII to interpret Title VIII. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844

F.2d 926, 935 (2d Cir. 1988), *superseded on other grounds by regulation as stated in MHANY*, 819 F.3d at 619 (citing cases).

HUD's Rule incorporates Title VII employment discrimination principles, which hold employers liable for employee-on-employee harassment. 81 Fed. Reg. 63,066 & n.27, 62,069; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998); *Petrosino v. Bell Atl.*, 385 F.3d 210, 225 (2d Cir. 2004). Courts consistently apply a negligence standard to assess such claims. *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 423 (4th Cir. 2014) (employers face Title VII liability for third-party harassment under a "knew or should have known" standard); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001) (an employer may be liable for harassment by a nonemployee against an employee); *Dunn v. Washington Cnty.*, 429 F.3d 689, 691 (7th Cir. 2005) (an employer is liable for any discriminatory condition it fails to reasonably address); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003) (an employer may be liable for third-party harassment if it knew or should have known but failed to respond).

3. This is particularly true considering this Court's past deference to agency actions taken in the absence of notice-and-comment rulemaking. This Court has held that the products of notice-and-comment rulemaking are "generally" entitled to *Chevron* deference, but has also deferred to nonbinding agency actions that are the product of "careful consideration." *Kruse*, 383 F.3d at 59–60. In *Kruse*, this

Court deferred to a HUD policy statement interpreting the Real Estate Settlement Procedures Act when that statement was issued in response to judicial decisions on the subject it addressed. HUD's Rule is more worthy of deference than the policy statement in *Kruse* because it was implemented through notice-and-comment rulemaking and thus represents a more carefully considered agency process reflecting the input of stakeholders and regulated entities. This Court must accord deference to HUD's measured and reasonable interpretation.

In sum, HUD used its delegated authority to formalize liability standards that are consistent with Title VII, incorporate extensive public comment, and reflect three decades of HUD's practices, which courts have accepted. Moreover, HUD's standard reflects the principle that housing actions are essentially tort actions, so liability in the housing context should closely mirror traditional tort principles. *Meyer*, 537 U.S. at 285 (2003). For these reasons, HUD's rule is a reasonable interpretation of the FHA. This Court should accord it deference.

II. REGARDLESS OF DEFERENCE, THIS COURT SHOULD LOOK TO TITLE VII AND ADOPT A NEGLIGENCE STANDARD, WHICH IS CONSISTENT WITH STATE LAW TORT PRINCIPLES.

Even if this Court does not accord *Chevron* deference to the HUD Rule, it should reach the same conclusion as HUD—that a landlord is liable for negligently allowing a hostile environment. Although there are differences between employment and housing, there is no meaningful reason not to apply analogous

Title VII principles in this context. This brief addresses the misconceptions behind the panel's hesitation to apply Title VII principles in this case. This Court would not "reflexively" adopt Title VII. *See Wetzel*, 901 F.3d at 863. Rather, this Court should adopt it intentionally in light of Title VII's clear applicability.

Moreover, Title VII principles are consistent with New York state law, which extends a landlord's direct liability beyond harmful conditions caused by the landlord alone to harmful conditions caused by other tenants, a principle that two other federal circuits have adopted.

A. This Court should fully embrace the Title VII framework.

This Court looks to Title VII in interpreting the Fair Housing Act. *E.g.*, *MHANY*, 819 F.3d at 613; *Khalil v. Farash Corp.*, 277 F. App'x 81, 83 (2d Cir. 2008); *see also Texas Dept. of Hous. & Comm. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518, 2521 (2015). Although there are differences between the employment and housing contexts, *e.g.*, *Francis v. Kings Park Manor, Inc.,* 944 F.3d 370, 391–92 (2d Cir. 2019) (Livingston, J., dissenting), those differences are immaterial in this context and do not justify deviating from this Court's precedent. This Court should apply Title VII principles in this case because there are no material differences between the employment and housing contexts that justify diverging from Title VII.

There are two primary differences between the employment and housing contexts. Neither undermines Title VII's applicability. First, the lack of an agency relationship between landlords and tenants does not impact the framework: Title VII already recognizes third-party claims absent an agency relationship (*e.g.* non-supervisors), which is highly analogous to landlords in the housing context. Second, because Title VII uses a negligence standard, any difference in control informs the fact-specific liability inquiry—not whether the framework itself is applicable. Since no material difference undermines the applicability of Title VII, the Court should rely on Title VII to resolve this case.[2]

1. Any differences in the degree of agency does not undermine Title VII's applicability. "[N]egligence sets a minimum standard" for employers' response to harassment under Title VII. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998). This minimum standard extends to harassment by nonsupervisory employees and third parties, where no agency relationship exists. *See, e.g.*, *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (harassment by students at university-employer); *Bentley v. AutoZoners, LLC*, 935 F.3d 76, 92 (2d Cir. 2019) (harassment by nonsupervisory employee). That is because employers have

[2] For a further examination of why the Title VII framework is appropriate in this context, see Aric Short, *Not My Problem. Landlord Liability for Tenant-on-Tenant Harassment*, 72 HASTINGS L.J. (forthcoming May 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3563894.

responsibilities to their employees, to whom they are obliged to provide a nondiscriminatory work environment, not just because employers are uniquely capable of addressing unlawful discrimination in the workplace. *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). When employers refuse to exercise their control, they "adopt[] the offending conduct," and face liability for failing in their obligations to employees. *Faragher*, 524 U.S. at 789.

That logic is equally applicable in the housing context. Landlords possess unique remedial powers and an obligation not to discriminate. Like employers in the workplace, landlords have unparalleled authority. They may issue official warnings, enforce lease provisions, and evict tenants. 81 Fed. Reg. at 63,071. Like a boss, a landlord that knows of harassment and fails to use her authority should be treated as adopting the offending conduct and violating her obligation to not discriminate.

2. Likewise, any differences between a landlord's and employer's degree of control does not undermine Title VII's applicability. Under Title VII, an employer's level of control is one consideration taken into account when assessing employer liability under the negligence standard—not a threshold requirement for liability or applying the standard at all. 29 C.F.R. § 1604.11(e). Indeed, when determining employer liability for harassment under Title VII, all this Court

requires is that an employer had constructive knowledge of a hostile environment but failed to reasonably respond. *Summa*, 708 F.3d at 124; *see also Ellerth*, 524 U.S. at 759. An employer's control is relevant to this analysis—given its level of control, an employer may be more likely to have constructive knowledge of harassment or be better able to effectively respond to that harassment. But no particular degree of control is required to state a claim or for an employer to be negligent.

The Court should adopt this framework for FHA claims, even if landlords may have less control than employers. Using the Title VII framework, a landlord's level of control would be relevant—but not determinative—in assessing liability for hostile environment harassment. Just as in Title VII, a defendant's lack of control might indicate a lack of knowledge or might suggest that an ineffective response to harassment was still reasonable. Conversely, a landlord with significant control over a housing environment and its tenants might reasonably be expected to use that control to respond more substantially to a discriminatory environment. This is a familiar inquiry, as courts already consider a landlord's level of control in determining liability for on-site injuries. *See, e.g.*, *Boyles v. Petrucelli*, 921 F. Supp. 1200, 1201 (S.D.N.Y.), *aff'd,* 104 F.3d 352 (2d Cir. 1996); *Duffy v. United States*, 49 F. Supp. 2d 658, 661 (S.D.N.Y. 1999).

This Court has a long history of looking to Title VII to interpret the FHA. It should do so here. Under the case-specific negligence analysis, agency and control will influence how the standard is applied. But there is no material difference between the employment and housing contexts that justifies deviating from this Court's long history of applying Title VII principles in interpreting the FHA.

B. State law tort principles result in the same outcome.

New York state law counsels the same outcome. Landlords are already subject to a "knew or should have known" negligence standard in the tort context, identical to the HUD Rule. Landlords are routinely liable for dangerous housing environments generally—even those caused by tenants—if they have constructive notice of the danger. That includes liability for items left on the premises by other tenants, *e.g.*, *Rivera v. 2160 Realty Co., L.L.C.*, 4 N.Y.3d 837, 838 (N.Y. App. Div. 2005), liability for dangerously hot water, *Flores v. Langsam Prop. Servs. Corp.*, 13 N.Y.3d 811, 812, and liability for structural damage, *Reynolds v. Knibbs*, 15 N.Y.3d 879, 880. Another common example in state law is dangerous animals. Landlords are liable to dog bite victims for injuries if they knew or should have known of a potentially vicious dog on the premises and had sufficient control to address the threat but did not take appropriate action. *See, e.g.*, *McKnight v. ATA Hous. Corp.*, 94 A.D.3d 957, 957 (N.Y. App. Div. 2012) (quoting *Sarno v. Kelly*, 78 A.D.3d 1157, 1157 (N.Y. App. Div. 2010)). Regardless of who causes a

dangerous environment, landlords may be liable for conditions on their property so long as they had constructive knowledge.

The other circuits that have considered the issue have held landlords liable. For example, the Seventh Circuit has held that landlords may be liable for failing to respond to tenant-on-tenant discriminatory harassment. *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856 (7th Cir. 2018). Similarly, the Eighth Circuit applied Title VII principles, finding that a landlord could be held liable for a hostile environment where other tenants constantly threatened and harassed a disabled tenant to the point of "depriv[ing] him of his right to enjoy his home." *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364–65 (8th Cir. 2003).

In the housing context, a negligence standard is especially compelling. The sanctity of the home is a bedrock principle spanning jurisprudence, from constitutional law to property law. *E.g.*, *Payton v. New York*, 445 U.S. 573, 585–89 (1980) (Fourth Amendment); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (First Amendment); *Dave Herstein Co v. Columbia Pictures Corp.*, 4 N.Y.2d 117, 120 (1958) (covenant of quiet enjoyment). That is because "the home is arguably the most private sphere. Our homes serve as the forum for our most intimate activities, including reproduction, consumption, and socialization." Carlotta J. Roos, Dicenso v. Cisneros: *An Argument for Recognizing the Sanctity of the Home in Housing*

Sexual Harassment Cases, 52 U. MIAMI L. REV. 1131, 1139–44 (1998). A tenant's inability to escape harassment at home magnifies its harmful impact.

Ultimately, neither this Court nor any other circuit has held that a landlord can evade responsibility for a discriminatory hostile environment merely because a tenant creates it. A landlord is best equipped to respond to the dangers created by a discriminatory hostile environment. When a landlord has knowledge, it is best positioned to respond with the authority and tools it already uses to regulate other behavior on the premises. When it negligently fails to respond, it should be responsible.

III. EFFECTIVE ENFORCEMENT REQUIRES A NEGLIGENCE STANDARD.

A negligence standard is the best approach for three reasons. First, it reflects the reality of today's affordable housing shortage. In the face of possible homelessness, many tenants will remain in their current housing, even if it means being forced to endure severe or dangerous harassment. Second, HUD's flexible standard provides ample protection against unreasonable claims by requiring an individualized, fact-specific review before a landlord can be held liable. Finally, it is more effective than the Title IX deliberate indifference standard.

A. Negligence is the only standard sufficient to protect tenants.

In most cities, affordable housing is an extremely limited commodity, and many tenants do not have the freedom to shop around for alternative options. *E.g.*, NATIONAL LOW INCOME HOUSING COALITION, THE GAP: A SHORTAGE OF AFFORDABLE HOMES 1 (Mar. 2020). As a result, victims of illegal harassment are often at the mercy of their landlords. The extreme power differential between landlords and tenants means that landlords rarely have an incentive to abate third-party harassment unless required by law. After all, they know low-income tenants have virtually no option but to stay and pay.

A negligence standard will ensure that landlords address discrimination within the properties they manage. A weaker standard, on the other hand, will encourage landlords to bury their heads in the sand and allow discrimination against tenants who have no other meaningful choice but to endure it.

B. HUD's flexible standard protects housing providers from unreasonable claims.

HUD's negligence standard is the superior approach because it prioritizes robust enforcement but still limits liability to situations in which the landlord knew or should have known and had the power to act. The negligence standard is a "fact-dependent inquiry" that turns on the landlord's degree of knowledge and control. *Francis v. Kings Park Manor, Inc.*, 917 F.3d 109, 122 (2d Cir. 2019), *opinion*

withdrawn, 920 F.3d 168 (2d Cir. 2019). But a landlord escapes liability if the appropriate corrective action is "beyond the scope of its power to act." *Id.* (citing 81 Fed. Reg. 63,071); *see also* 24 C.F.R. § 100.600(a)(2)(i).

1. Under HUD's standard, courts evaluate conduct based on the "totality of the circumstances" to determine if the alleged harassment is sufficiently "severe or pervasive" to create a hostile environment. Relevant factors include "the nature of the conduct, the context in which the incident(s) occurred, the severity, scope frequency, duration, and location of the conduct, and the relationships of the persons involved." *Id.* § 100.600(a)(2)(i)(A). This "non-exhaustive list" reflects HUD's aim of "providing courts with the flexibility to consider the numerous and varied factual circumstances that may be relevant when assessing a specific claim." 81 Fed. Reg. 63,062.

2. Additionally, the HUD Rule acknowledges that "not every quarrel among neighbors amounts to a violation of the Fair Housing Act." *Id.* at 63,069. Rather, its standard is designed to "ensure that mere disagreements, mistaken remarks, or isolated words spoken in the heat of the moment will not result in liability unless the totality of the circumstances establishes hostile environment harassment." *Id.* at 63,061. The Rule approvingly cites case law across the circuits setting a high bar for conduct that amounts to a hostile environment and dismissing claims that fail to meet it. *Id*.

3. HUD's Rule also imposes a constructive knowledge requirement to protect good-faith actions, while simultaneously accounting for the landlord-tenant power differential that deters tenants from reporting harassment. The standard invites courts to evaluate whether a reasonable person in the housing provider's position would have detected a hostile environment. "[I]f the knowledge component is not met, a housing provider cannot be held liable for a resident's or third-party's discriminatory conduct." *Id.* at 63,067.

4. Further, HUD recognized that landlords are likely to use the tools at their disposal to respond to tenant-on-tenant racial harassment before they become liable. These tools are generally the same tools landlords use to enforce any rule—"[c]reating and posting policy statements against harassment and establishing complaint procedures, offering fair housing training to residents and mediating disputes before they escalate, issuing verbal and written warnings and notices of rule violations, enforcing bylaws prohibiting illegal or disruptive conduct, issuing and enforcing notices to quit, issuing threats of eviction and, if necessary, enforcing evictions and involving the police …." 81 Fed. Reg. 63,071. "[T]here is no one way that a housing provider must respond to complaints of third-party harassment." *Id.* at 63,070. These are tools landlords use in the normal course of business.

Ultimately, HUD's negligence standard strikes the best balance: subjecting landlords to liability to protect tenants from hostile environments—consistent with a landlord's existing duty to provide habitable premises and quiet enjoyment of property—without subjecting landlords to excessive liability.

C. A negligence standard is more appropriate in the housing context than a deliberate indifference standard.

The primary alternative standard presented in this case is deliberate indifference. But deliberate indifference has proven inadequate in the Title IX context and is even more poorly suited to the housing context. Instead, this Court should adopt a negligence standard.

Deliberate indifference holds a defendant liable when she acts with reckless or conscious disregard for the discriminatory consequences of her actions. *See, e.g.*, *Wetzel*, 901 F.3d at 856. This is the standard for university liability for student-on-student harassment under Title IX. *Davis ex rel. Shonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648–49 (1999). The Supreme Court imposed this high standard to protect schools from liability for harassment over which they had no meaningful control, reasoning that a school's authority over its students is limited, even in primary and secondary schools, *Davis*, 526 U.S. at 644–53.

But Title IX litigation is replete with examples of egregious outcomes that illustrate the deficiencies of the deliberate indifference standard. In one case, for

example, a disabled boy was forced to return to a classroom with a student who had sexually assaulted him. *Porto v. Town of Tewksbury*, 488 F.3d 67, 70 (1st Cir. 2007). The abuse escalated to rape, and the boy attempted suicide before being hospitalized and eventually leaving school. On appeal, the First Circuit held that the school had not acted "clearly unreasonably" by returning the two students to the same classroom, despite the school's awareness of the prior assaults. *Id.*; *see also* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2084 (2016) (discussing the case); *see generally* Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 227 (2011).

Deliberate indifference poses a virtually insurmountable obstacle for even the most brutalized victims. To hold a school liable for failing to respond to sexual harassment, students must establish that the school had "actual knowledge" of a discriminatory hostile environment, and in response, acted "clearly unreasonably in light of known circumstances." *Davis*, 526 U.S. at 648–49. This heightened standard disincentivizes schools from implementing policies to respond to sexual harassment of students. The threshold "actual knowledge" prong requires that an official knew of the harassment. The "actual knowledge" prong was intended to protect schools from liability for harassment they could not control, but has been

interpreted by some courts as a very "narrow, specific, individualized notion of notice, requiring notice of the risk the particular perpetrator would sexually abuse the particular victim before he does, in the way he does." *See* MacKinnon, at 2070. Knowing that they cannot be held liable for harassment of which they did not "officially" know, schools are incentivized to avoid creating preventative procedures that would trigger a duty to respond. These perverse incentives undermine Title IX's legislative purpose. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 688–89 (1979).

By contrast, a Title VII negligence standard strikes the right balance. Its flexible constructive knowledge requirement reduces the likelihood that a landlord will ignore a hostile environment. And it still provides landlords protection from unreasonable claims, as landlords will not be liable when (1) a plaintiff fails to establish the behavior amounted to "unlawful harassment," (2) a landlord does not know about the harassment or have knowledge to reasonably discover it, or (3) the landlord lacks power to take corrective action. *See supra* section I.A.

* * *

The sanctity of one's home is foundational to our society. As such, Congress prohibited discrimination in housing. Because HUD has reasonably interpreted the FHA to apply a Title VII negligence standard to landlords who fail to address tenant-on-tenant harassment, this Court should defer to HUD's reasonable rule.

But even if it doesn't, the Court should adopt a negligence standard because it is the only way to achieve the goals of the FHA while protecting both tenants and landlords.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) and Local Rule 32.1(a)(4)(A), as well as Rule 29(a)(5) and Local Rule 29.1(c), because it contains 5,670 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word Version 16.35, in Times New Roman 14-point type.

CERTIFICATE OF SERVICE

I, Brian Wolfman, hereby certify that on May 7, 2020, I served a copy of the Motion for Leave to File Brief by Georgetown University Law Center Civil Rights Clinic as Amicus Curiae in Support of Plaintiff-Appellant and En Banc Brief for Amicus Curiae Georgetown University Law Center Civil Rights Clinic in Support of Plaintiff-Appellant on all counsel of record in this appeal using the CM/ECF system pursuant to Second Circuit Local Rule 25.1(h).

May 7, 2020 /s/ Brian Wolfman